(16)

No. 95-1184

In The

Supreme Court of the United States

October Term, 1995

DANIEL R. GLICKMAN,
SECRETARY OF AGRICULTURE,

Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF *AMICI CURIAE* STATES OF ARIZONA, CALIFORNIA, FLORIDA, MICHIGAN, NEBRASKA, NEW JERSEY, NEW YORK, OREGON, VERMONT, AND VIRGINIA IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

The States of Arizona, California, Florida, Michigan, Nebraska, New Jersey, New York, Oregon, Vermont, and Virginia, through their Attorneys General, submit this *amicus curiae* brief in support of petitioner. The court below invalidated a federal marketing order provision that authorizes the use of mandatory assessments on the sale of peaches, plums, and nectarines for the purpose of conducting generic advertising and promotion of those crops.

Amici have vital interests in this matter because they have adopted marketing acts generally modelled after the Agricultural Marketing Agreement Act of 1937 ("AMAA", 7 U.S.C. 601 *et seq.*), under which the marketing orders under review were adopted. Like the AMAA, the state laws generally provide for mandatory assessments for generic promotion of the covered agricultural commodity. Unless the decision below is reversed, such assessments – which are vitally important to the economic health of *amici* states – may be jeopardized.

Whether the marketing order at issue is analyzed under the *Abood*[1] line of cases – as *amici* contend it should be – or under the *Central Hudson*[2] test applied by the Ninth Circuit, a close analysis of the governmental interests furthered by the order is required. Through their comprehensive oversight of agricultural commodities, the *amici* states are particularly well situated to address those

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[1] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1976)

[2] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1989).

interests. This brief is therefore devoted primarily to describing how destabilizing features inherent to the agricultural market necessitate governmental intervention, and how the marketing order at issue is a vital tool for stabilizing the market. In this matter, *amici* states endeavor to assist the court in the resolution of this case.

SUMMARY OF ARGUMENT

1. *Amici* concur in the petitioner Secretary of Agriculture's position that the Ninth Circuit erred in using the *Central Hudson* test, which applies only to governmental prohibitions of commercial speech. The economic free association cases,[3] which address compulsory fees used to pay for speech in agency shops and integrated state bars, plainly provide the applicable guidelines here. Respondents complain of forced association, not government-imposed limits on what they can say. *Amici* will not restate the petitioner's argument, which amplifies that point. We do, however, illustrate one particular reason why the lower court's analysis was fatally flawed. The objective of the three-part *Central Hudson* test is to protect consumers' interest in obtaining information. *Central Hudson*, 447 U.S. at 563; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). The flow of truthful information to consumers is not impaired by the commodity promotion program; indeed, the opposite is true.

[3] *Amici* will hereafter refer to the interests addressed in the *Abood* line of cases as that of "economic free association."

The extra hurdles imposed by the *Central Hudson* test are therefore inapplicable.

2. The commodity promotional programs meet the requirements for the test of economic free association formulated in the *Abood* line of cases.

(a) Importance of Governmental Interest:

The governmental interest in supporting a stable agricultural economy and preventing "free riders" is as "vital" as the interest in labor peace that justifies agency shop regulation. Support for the agricultural sector of the economy is vital to assure the adequate and steady production of food and fiber. This interest has provided justification for the extraordinary measure of government price supports. The need for concerted action for advertising is greater for agricultural products than for manufactured products because of their homogenous, perishable, seasonal nature; because of the inelasticity of demand and the slow response in production to change in demand; and, because of the atomistic distribution of producers. The programs help stabilize the market by enhancing demand for the products through improved consumer information about the attributes and use of the agricultural products. This is now generally accepted as preferable to historical government programs aimed at stabilizing the market through techniques of creating artificial scarcity and of using taxpayer dollars to support farm prices.

(b) Degree of Intrusion on Free Associational Rights:

Intrusion on First Amendment associational rights poses less of a concern with a commodity promotion

program than with the agency shop or integrated bar. This is for two reasons. First, the collective representation that is justified by the government interest has less potential for infringement on core First Amendment concerns; the communicative purpose is limited to conveying a commercial message. Second, a government marketing program has a very circumscribed range of activities in which it is authorized by law to engage. Thus, it is unlike the union shop where, although the union is the sole authorized bargaining agent, it retains, as a private organization, the right to engage in a great range of expressive activity outside its collective bargaining role. Because of a union's dual role, there are frequent challenges regarding which of those otherwise lawful union activities a dissenting represented employee can be required to pay for. The commodity marketing program, lacking a dual private-public role, does not present these problems.

(c) Degree of Intrusion on Free Speech Rights.

A commodity promotion program imposes no limitation at all on free speech rights, making it less intrusive on First Amendment interests than the union shop, where a represented employee is denied the right to represent himself in negotiations with the employer concerning employment conditions. Indeed, the AMAA expressly forbids a marketing order's placing any restrictions on a producer's own advertising efforts.

ARGUMENT

I. THE SECOND AND THIRD PRONGS OF THE TEST FOR GOVERNMENT LIMITATIONS ON COMMERCIAL FREE SPEECH DO NOT APPLY TO THE INTEREST AT BAR BECAUSE THAT INTEREST, THE MERE REQUIREMENT TO PAY A FAIR SHARE FOR COMMERCIAL SPEECH, IS OF A LOWER ORDER OF CONSTITUTIONAL CONCERN.

The *amici* states concur with petitioner Secretary of Agriculture that the *Abood* line of cases, not the *Central Hudson* test, applies to respondent's First Amendment challenge to the marketing order at issue. The *Central Hudson* test applies to government limitations on commercial speech; the *Abood* line of cases addresses the use of compulsory fees to pay for speech which the contributor does not support. This case manifestly involves the latter issue and not the former. Rather than restating petitioner's argument here, *amici* seek only to highlight one particular reason why the *Central Hudson* test is inapposite to this case.

The *Central Hudson* test has three prongs. A restriction on commercial speech is constitutional if (1) the government interest supporting the restrictions is "substantial"; (2) the restrictions "directly advance" the asserted interest; and (3) the restrictions are "[no] more extensive than is necessary to serve that interest." 447 U.S. at 566. Although the first prong's requirement for the degree of the government interest necessary to justify the regulation is no higher than for the economic free association cases,[4] the second and third

[4] This Court has described the government interest required to justify infringement of economic free association as

Central Hudson prongs pose additional hurdles that are unnecessary here. These substantial hurdles are designed to benefit the interests of consumers by assuring the free flow of information; they are not designed to protect the interests of speakers. The court below erred in applying them in this case, where consumers' information is *increased* by the generic advertising program supported by the marketing orders.

This Court has made clear that the reason the First Amendment has come to extend its protection to commercial speech is so that the buyer has the necessary information to make informed decisions in the marketplace. As explained in *Central Hudson*, "the First Amendment's concern for commercial speech is based on the informational function of advertising." 447 U.S. 557, 563. "By protecting those who wish to enter the marketplace of ideas from governmental attack, the First Amendment protects the *public*'s interest in *receiving* information." *Pacific Gas & Electric v. PUC of California*, 475 U.S. 1, 8 (1985) (emphasis added.) Extending First Amendment protection to commercial speech has been deemed "justified principally by the value to *consumers* of the information such speech provides." *Zauderer v. Office*

"vital," which clearly is as high as the *Central Hudson* requirement of "substantial." See the following passage from *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990):

> [L]egislative recognition that the agency-shop arrangements serve *vital national interests* in preserving industrial peace, see *Ellis*, 466 U.S., at 455-456, indicates that such arrangements serve *substantial public interests*. . . .

Emphasis supplied.

of Disciplinary Counsel, 471 U.S. 626, 651. (Emphasis added.) This is because a ban on truthful advertising hurts the consumer by "hinder[ing] consumer choice." 44 *Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1208, ___ U.S. ___ (1996). From the consumer's point of view, "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, ___ U.S. ___ (1995).

Thus, out of concern for the *consumer's* interest in availability of information relevant to making economic decisions, *Central Hudson* set the barrier for the second and third prongs relatively high. "[T]he free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful." *Zauderer, supra*, 471 U.S. 626, 646.

The interests of the *seller* in *not* being required to provide commercial information are less weighty. A free association corollary to the principle of protecting commercial free speech in order to protect the public's access to information is that the government may compel disclosures, warnings or disclaimers as part of commercial speech to "dissipate the possibility of consumer confusion or deception." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651.[5]

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[5] By contrast, the government may not compel disclosures as part of soliciting for charity because, although it may be a commercial activity for the solicitor, the activity is inextricably intertwined with core First Amendment speech. *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 798 (1988).

Zauderer emphasized important differences in the distinctions made as to two separate parameters of First Amendment analysis that bear on this case.

One parameter considers whether the government regulation *compels* speech (or financial contribution to speech) or *prohibits* speech – the "free association" v. "free speech" dichotomy. The other parameter gauges the sensitivity of the interest – be it in the more sensitive "core" area or in the less sensitive economic or commercial area.

As to the distinction between compulsion and prohibition, the Court in *Zauderer* underscored that there are "material differences between disclosure requirements and outright prohibitions on speech." *Id.* at 650. Thus, the two interests require different analyses.

As to the sensitivity of interest parameter, the Court outlined the different treatment justified by the different value accorded, respectively, to free association interests in core areas and to free association interests in commercial areas.

As *Zauderer* explained:

> We have, to be sure, held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech. [Citing *Wooley v. Maynard*, 430 U.S. 705 (1970); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624].
>
> But the interests at stake in this case are *not of the same order* as those discussed in *Wooley, Tornillo*, and *Barnette*. Ohio has not attempted to prescribe "what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642. The State has attempted only to prescribe what shall be orthodox in commercial advertising. . . . Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, see *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is *minimal*.

Id. at 450-451. (Emphasis added.)

In the case of the commodity promotional program, the interest implicated is solely that of being compelled to pay for speech, not in being prohibited or limited in any way from speaking. Clearly, if, as *Zauderer* found, the interest in not disclosing information as a part of commercial speech is minimal, the interest in avoiding payment of one's fair share of the cost of advertising from which one receives benefit is even *more minimal*.

In sum, because the flow of truthful information to consumers is in no way impeded by a program using assessments for an agricultural commodity promotion and advertising program, and because there is only a minimal free associational interest in being protected from the requirement to pay a grower's fair share for advertising from which it benefits, the commodity promotional program should not be subjected to the more strenuous requirements posed by the second and third prongs of the *Central Hudson* test. Rather, the economic

free association test, whose factual application to commodity marketing programs this brief will address next, is the appropriate test by which to judge such a program's constitutionality.

II. THE GENERIC MARKETING PROGRAMS SATISFY THE REQUIREMENTS OF THIS COURT'S "ECONOMIC FREE ASSOCIATION" JURISPRUDENCE.

The economic free association cases – among which *Abood v. Detroit Board of Education, supra,* 431 U.S. 209 (agency shop), *Keller v. State Bar of California,* 496 U.S. 1 (1990) (integrated bar), and *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507 (1990) (agency shop) are prominent – look to three factors to determine the constitutionality of statutory schemes requiring collectivized representation for the purpose of furthering economic interests. They are:

1. Strength of Government Interest. Whether the collective representation is a reasonable means to support a "vital" governmental interest in economic regulation. (*Lehnert, supra,* 500 U.S. at 519; *Keller, supra,* 496 U.S. at 13.)

2. Limits on Abridgement of Free Association. Whether the use of the compelled payment is limited to costs that are germane to the function for which collectivized representation is imposed. *Lehnert, Id.*

3. Limits on Abridgement of Free Speech. Whether the program avoids "significantly add[ing] to the burdening of free speech that is inherent" in the function for

which the collectivized representation is imposed. *Lehnert, Id.*[6]

The marketing orders at issue meet these three tests: Collectivized representation for promoting the sale of agricultural commodities is a reasonable means to support the vital government interest in stabilizing the agricultural market; the AMAA and state programs fashioned after it are less intrusive upon free associational interests than an agency shop or integrated bar; and these programs pose no threat whatsoever of abridging free speech.

A. A STABLE AND ECONOMICALLY VIABLE AGRICULTURAL SECTOR IS A VITAL GOVERNMENTAL INTEREST THAT COMMODITY PROMOTION SIGNIFICANTLY BOLSTERS.

Maintaining a stable market for its agricultural products is a vital governmental interest. At the very basis of a country's welfare is its ability to provide food and fiber in an adequate quantity and diversity, at reasonable prices and at the time and place required, to meet the needs of

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[6] The interests at stake in these cases are unlike the interests in the constitutionally more intrusive invasion into core free association concerns, as where the individual is forced "as a part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." (*Wooley v. Maynard,* 430 U.S. 705, 715 (1977)). With the agency shop and integrated bar cases, and with the agricultural commodity promotion program, the only participation that can be required is financial and the message is of an economic nature.

its citizens. Thus, a stable agricultural market is also pivotal to a country's sovereignty interest in being economically self-sufficient. This has been keenly understood by the nation states of the world, and for this reason, agricultural policy has been a stubborn, if not intractable, issue in the efforts of the countries of the world to achieve economic integration.[7] Even as nation-states increasingly have come to understand politically, as well as intellectually, that integrating the world market can ultimately hold out the best hope for the economic well-being of all of the world's citizens, nation-states have rational concerns to preserve their independence in their ability to meet, within their own borders, their citizens' needs for a plentiful supply of food and fiber. There is also widespread recognition that the health and vitality of rural communities is dependent on the level and stability of agricultural income.

The agricultural market is, however, subject to a number of destabilizing factors. This is because of the characteristics inherent in the business of agricultural production and marketing, which include (a) variable supply and inelastic demand; (b) seasonality and perishability of product; (c) lagged production and limited

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[7] See, e.g., Schoenbaum, Thomas J. "Agricultural Trade Wars: A Threat to the GATT and Global Free Trade", 24 *St. Mary's Law J.* 1165 (1993); Montana-Mora, Miguel "International Law and International Relations Cheek to Cheek; An International Law/International Relations Perspective on the U.S./E.C. Agricultural Export Subsidies Dispute." 19 *N.C.J. Int'l L. & Comm. Reg.* 1 (1993); Purnell, David R. "1993 International Trade Update: The GATT and NAFTA" 73 *Neb. L. Rev.* 211, 214-215 (1994).

mobility of resources; and, (d) an industry consisting of many small growers producing homogeneous products. Commodity promotion and advertising programs help stabilize and increase the demand for the product to support the income of the growers through the vicissitudes of agricultural business ups and downs.

1. The Agricultural Market is Subject to Numerous Destabilizing Factors Which Necessitate Governmental Intervention.

The Department of Agriculture issued the challenged marketing orders to combat longstanding but persistent difficulties faced by agricultural suppliers. The following is a brief description of the destabilizing factors which compel governmental intervention.

(a) Variable Supply and Inelastic Demand.

The supply of a particular agricultural commodity varies significantly from year to year. The variability results both from weather variations and from crop characteristics. Many tree crops characteristically alternate from year to year between large crops and small crops.[8] The "boom or bust" nature of crop supply conduces to considerable instability in the agricultural market.

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[8] Heifner, R., W. Armbruster, E. Jesse, G. Nelson, and C. Shafer. *A Review of Federal Marketing Orders for Fruits, Vegetables, and Specialty Crops*. Washington, D.C.; U.S. Dept of Agriculture, Agricultural Marketing Service, Agricultural Economic Report No. 477, (1981) pp. 6-12.

On top of this, the demand for agricultural commodities is inelastic, *i.e.*, prices are very responsive to changes in availability of the product, so that a one percent increase in quantity can result in more than a one percent decrease in price. The result is that the total income from a *large* crop is very frequently *smaller* than from a *small* crop. Inelasticity is especially strong for specialty crops, tree fruits and nuts, for which the United States dominates the world market. For example, when the size of the California avocado crop dropped from 570 million pounds in 1992/1993 to 271 million pounds in 1993/1994, the value rose from $118 million to $251 million.[9] Because of the variable supply and inelastic demand, there is significant year-to-year price variability. As an example, for the decade of 1970 through 1980, the average variability of nectarine, plum and peach prices in California exceeded, respectively, 20 percent, 31 percent, and 22 percent.[10] Had it not been for the commodity promotion program in effect under the marketing order here under review, the variability would have been even greater.

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[9] California Avocado Commission Annual Report, 1994-1995. The price inelasticity for peaches, nectarines and plums, the subjects of the marketing order under review, has been estimated to result, with a 1 percent increase in crop size, in a 2.3% (peaches), 2.7% (nectarines) and 3.9% (plums) reduction in price. Freed, Ron, "The Impact of Various Economic Factors on Grower Price and Maximizing Crop Value by Optimizing the Marketing Mix for California Tree Fruit Agreement," June, 1993. The California Tree Fruit Agreement is the agency that administers the marketing order here under review.

[10] Heifner, *et al.*, n. 8, *supra*, p. 9.

(b) Seasonality and Perishability.

Because produce is ripe and ready for market during a limited time span during the year, and because much produce is highly perishable, producers are in a weak bargaining position. If the market is unfavorable when the crop is ready for market, the producer cannot withhold the produce until the market improves. As this Court noted in *National Broiler Marketing Assn. v. United States*, 436 U.S. 816, 825 (1977), "[a] large portion of an entire year's labor devoted to the production of a crop could be lost if the farmer were forced to bring his harvest to market at an unfavorable time." "Historically, perishability of produce forced the farmer to take whatever price he could obtain at the time of the harvest. . . . Even in a reasonably competitive market, physical inability to withhold produce will place a producer at a disadvantage." *Id.* at 840 (White, J. dissenting). Within a season, prices can vary *substantially* from week to week, depending on supply. For the 1992 season, for example, the price of peaches varied from $7.00 to $26.00 per carton, nectarines varied from $7.00 to $32.00 per carton, and plums varied from $6.00 to $28.00 per carton.[11]

Advertising and promotion programs that increase overall demand by providing information on the availability, fruit characteristics, maturity standards, etc., help reduce price variability and improve producer returns by increasing the minimum prices.

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[11] Federal State Market News Service, *Marketing California Nectarines, Peaches, Plums, 1992.*

(c) Lagged Production and Limited Mobility of Resources.

Producers of perennial crops, including tree crops such as peaches, plums and nectarines, face problems of 30 to 40 year planning horizons, long lags (a minimum of 3 years but more for many crops)[12] between initial planting and production, essentially fixed assets, and large capital requirements. These factors are conducive to maintaining excess capacity, which, of course, results in a lowering of prices. There is a tendency to overinvest when prices are favorable. Then, when prices drop, adjustments are both difficult and slow because of the specialized nature of production resources. For example, an orchard may stay in production for a long period even when returns and incomes are very depressed, because the cost of replacing the orchard with a more valuable crop is high.[13] The problem of sustained low incomes due to limited mobility of resources out of commitment to a particular crop is referred to as "the farm problem".[14]

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[12] For example, it takes 5 years to bring a peach tree into commercial production; periods for some other tree crops are lemons – 5 to 6 years; prunes – 6 years; walnuts – 6 to 8 years; and pecans – 8 years. California Agricultural Statistics Service, *California Fruit & Nut Acreage* (1992). Livestock producers also have to deal with biological lags.

[13] Johnson, G.L., and L. Quance, *The Overproduction Trap in U.S. Agriculture*. Resources for the Future, Washington D.C. (1972).

[14] Gardner, B.L. "Changing Economic Perspectives on the Farm Problem." 30 *Journal of Economic Literature* 62-101 (1990).

(d) Many Small Producers and Homogeneous Products.

"[A]griculture is made up of a large number of widely dispersed, atomistic producers with no one producer of sufficient size to significantly affect markets."[15] In 1992, in California, for example, there were more than 10,000 grape growers, more than 6000 almond growers, and almost 6000 peach growers.[16] Because market power is diluted among so many individual producers, producers have always considered themselves to be price takers rather than price makers.[17] A factor further undercutting an individual producer's ability to create a market is that, unlike for most manufactured products, the product of one agricultural producer is not readily distinguishable from that of another producer. The peach or nectarine produced on Farm A appears very much like the peach or nectarine produced on Farm B. Thus, a

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[15] Looney, J.W., "The Changing Focus of Government Regulation of Agriculture in the United States" 44 *Mercer L. Rev.* 763, 767 (1993). See, also, Davidson, Kenneth M., "Symposium: 1982 Merger Guidelines: The Competitive Significance of Segmented Markets," 71 *Calif.L.Rev.* 445, 451, n. 32 (1983) ("Agriculture is an atomistic homogeneous product market. It is periodically subject to both natural disasters and economic distress from overproduction.").

[16] U.S. Dept. of Commerce, Bureau of the Census, *1992 Census of Agriculture, California State and County Data.*

[17] Forker, Olan, & Ronald Ward, *Commodity Advertising*, Lexington Books (1993) at 7. ("Since the producers are small in size and large in number relative to the purchasers of their production they have considered themselves 'price takers' with little influence over the price or form of their products when marketed.")

producer cannot readily establish a market for his own produce as distinct from all the others.

> In the vast sea of farms, all producing fungible commodities, no farmer can demand a price higher than the prevailing market rate. Nor can any one farmer, acting alone, affect price merely by manipulating output.[18]

"Due to this atomistic nature of agricultural production," government regulation of agriculture has been designed to protect the individual farm from market instability, "boom-bust pricing cycles."[19]

2. The Marketing Orders At Issue Are An Important and Reasonable Tool Used by the Government to Address Instability in the Agricultural Market.

(a) Other Government Programs Which have Historically Been Used to Stabilize the Agricultural Market Are Not Currently Viewed as Satisfactory.

Early Congressional responses to the fragile and unstable conditions of agricultural markets were exemptions to antitrust provisions. They were conceived to permit agricultural cooperatives to form in order to give producers some control over market conditions.[20] Then,

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[18] Chen, Jim, "The American Ideology", 48 *Van. L. Rev.* 809, 853 (1995)

[19] Looney, n. 15, *supra*, at 767

[20] Exemptions in the Clayton Act of 1914, ch. 323, § 1, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-17) and the Capper-Volstead Act of 1922, ch. 57, § 1, 42 Stat. 388 (1922) (current version at 7 U.S.C. §§ 291-292 (1988)). See Looney, n. 15, *supra*, at 767.

in response to the very low farm prices of the depression, Congress passed legislation that sought to maintain prices by limiting production, *i.e.*, to raise prices by artificially creating scarcity. Congress first did this through the Agricultural Adjustment Act of 1933, which offered monetary payments to farmers in exchange for limiting production.[21] 1937 saw the arrival of the Agricultural Marketing Agreement Act, which in its current form is the basis of the case before this Court. This act also authorized control of quantity in order to maintain prices.[22] The following year, Congress enacted the Agricultural Adjustment Act of 1938, which included provisions both for production control and for payment to growers.[23]

Various federal agricultural programs in the last fifty years have involved government payments to farmers on a large scale.[24] In 1992, for example, 75 percent or more of the nation's wheat, cotton, rice, and feed grain acreage

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[21] Ch. 25, 48 Stat. 31 (1933) (current version at 7 U.S.C. §§ 601-626.) See Looney, n. 15, *supra*, at 765.

[22] Ch. 296, 50 Stat. 246 (1937)

[23] Pub.L. No. 75-430, ch. 30, 52 Stat. 31 (1938)

[24] For a discussion of the history of price supports, see Rasor, Paul B. and James B. Wadley, "The Secured Farm Creditors Interest In Federal Price Supports: Policies and Priorities," 73 *Ken. L.J.* 597 (1985); and Rasmussen, Wayne D., "New Deal Agricultural Policies after Fifty Years," 68 *Minn. L. Rev.* 353 (1983).

was enrolled in a price support program.[25] Over time, the public has become disenchanted with both quantity controls and price supports.[26]

(b) The Commodity Marketing Programs Have Come to Be Accepted as Effective and Appropriate Means for Supporting the Agricultural Market.

As both creation of artificial scarcity and heavy taxpayer support for farmers have fallen into disfavor, generic promotion and advertising for agricultural commodities have come to be viewed as an important program to improve farm prices and incomes with very small costs to government.[27] By the mid-1980s, there was general acceptance of support for generic promotion through mandatory assessments under both marketing orders and "checkoff" programs.[28]

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[25] Malasky, Alan R., Christopher R. Kelley & Susan A. Schneider, "Resolving Federal Farm Program Disputes: Recent Developments" 19 *Wm. Mitchell L. Rev.* 283, 285 (1993).

[26] Forker and Ward, n. 17, *supra*, at 89; Malasky, *et al.*, n. 25, *supra*, at 298. A common criticism of the price and income support programs has been that most of the benefits are received by the large producers. Looney, n. 15, *supra*, at 790-91.

[27] See, e.g. Rausser, Gordon C. and David Nielson, "Looking Ahead: Agricultural Policy in the 1990s." 23 *U.C.Davis L. Rev.* 415, 422-427 (1990).

[28] Forker and Ward, n. 17, *supra*, at 89. "Checkoff" refers to the manner of funding, in that the funds are normally deducted from the payment made to the producer by the handler.

Generic advertising is described as follows:

> "Generic advertising is the cooperative effort among producers of a nearly homogeneous product to disseminate information about the underlying attributes of the product to existing and potential consumers for the purpose of strengthening demand for the commodity."[29]

Through commodity marketing programs, producers have been able to put together enough money to "operate rather large information programs to inform consumers of the attributes of their commodity . . . . " (*Id.* at 10.)

An individual producer would not find it economic to engage in generic advertising, as is illustrated by the following example. Suppose that returns from a generic advertising program are $10 for each $1 spent and there are 500 equally small producers of a commodity. If an individual producer spends $10, the benefits to the industry will be $100, but since the benefits are distributed equally based on the amount sold, the individual producer gets a return of only $.20 for the $10 expenditure. Thus, the use of assessments from all producers of a commodity is necessary to ensure that for the benefit, which is equally shared, the cost is also equitably distributed. The sharing of costs through mandatory assessments avoids the "free rider" problem, which this Court has found to be a vital government interest in the agency shop context. *See, e.g., Lehnert, supra,* 500 U.S. at 519. As two noted commentators have stated:

> Commodity checkoff programs are a direct outgrowth of the potential free-rider problem.

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[29] Forker & Ward, n. 17, *supra*, at 2.

> Commodity industries recognize the need to advertise their products but also recognize the need for everyone who benefits to pay their share of the program costs.

Forker and Ward, n. 17, *supra*, at 19.

The programs can be very effective in terms of return to the growers for each promotional dollar spent. For example, a just-completed study conservatively estimates net industry returns for the California Table Grape Commission's promotion program as five dollars for every dollar spent.[30]

(c) The Importance of the Commodity Marketing Programs as a Means of Stabilizing the Agricultural Market Will Continue to Grow.

The role of generic advertising in stabilizing the agricultural market will continue to increase as the market becomes larger and more complex. Just as earlier in this century the agricultural economy went from local to interstate in scale,[31] it has now become

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[30] Alston, J.M., J.A. Chalfant, J.E. Christian, E. Meng, and N.E. Piggott, *The California Table Grape Commission's Promotion Program: An Evaluation*. Report to the Commission, July 10, 1996. Other examples are provided in the *amicus curiae* brief by the Washington Apple Commission, *et al.*

[31] Portions of the first Agricultural Adjustment Act of 1933 were declared unconstitutional by this Court in *United States v. Butler*, 297 U.S. 1, 74 (1936), in part because they dealt with what was deemed a "local" matter, i.e., agriculture. When the broader Agricultural Adjustment Act of 1938 was reviewed by this court in *Wickard v. Filburn*, 317 U.S. 111 (1942), agriculture had expanded and was deemed an interstate enterprise. See, Looney, n. 15, *supra*, at 765.

internationalized.[32] As noted in *amici* states' brief to this Court in support of the Secretary of Agriculture's petition for *certiorari* in this matter, collective promotional efforts by producers become more important as markets become more distant and complex and as possible trade barriers pose potential hurdles to access relevant markets.[33] The United States is the world's largest agricultural exporting nation, accounting for approximately one-sixth of the world's agricultural trade.[34]

Moreover, with the Uruguay Round of GATT negotiations and with NAFTA, some of the traditional agricultural supports will no longer be available. For example, section 22 of the Agricultural Adjustment Act of 1933, as amended, authorized (until recently) the Secretary of Agriculture to limit agricultural imports where they would interfere with any of the price support programs. 7 U.S.C. § 624 (1988). Under the Uruguay-Round-

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[32] The internationalization of agriculture is a constant theme in recent law review articles. See, *e.g.*, Centner, Terence J., "The Internationalization of Agriculture: Preparing for the Twenty-First Century" 73 *Neb. L. Rev.* 5 (1994).

[33] *Brief of Amici Curiae of the Attorneys General of the States of Arizona, California, Florida, Georgia, Michigan, Nebraska, New Jersey, Oregon, Vermont, Virginia, and Washington in support of the U.S. Solicitor General's Petition for Writ of Certiorari*, filed March 21, 1996, at 11-13.

[34] Purnell, David R., "A Critical Examination of the Target Export Assistance Program, Its Transformation into the Market Promotion Program and Its Future," 18 *N.C. J. Int'l L & Comm. Reg.* 551, at n. 71 (1993).

generated World Trade Organization Agreement on Agriculture, however, no quantity limits or fees may be imposed on any product of a World Trade Organization member, and various agricultural subsidies are prohibited or highly restricted.[35] NAFTA also limits import restrictions[36] and will essentially remove all restrictions by the year 2008.[37]

Even as this Court has recognized the importance of collective representation for the "atomized" labor market in the union and agency shop cases, along with the need to avoid free riders, so should it also recognize the importance for the atomized producers of an agricultural commodity to engage in collectivized representation in order to market their produce, along with the equal importance in avoiding free riders. In sum, the use of assessments for a generic promotional program meets the threshold test of being a reasonable means to accomplish a vital governmental interest.

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[35] Agreement on Agriculture, Articles 4(2), 6, 7, Annex 1A, Agreement Establishing the World Trade organization, April 15, 1994 (reprinted in H.R. Doc. No. 316, 103 Cong., 2d Sess. 1355 (1994)); see 43 U.S.C. § 624(f). See, Gantz, David A. "A Post-Uruguay Round Introduction to International Trade Law in the United States," 12 *Ariz. J. Int'l & Comp. Law* 7 (1995); Figueroa, Miguel A., "The GATT and Agriculture," 5 *Kan. J. of Law and Pub. Pol.* 93 (1995).

[36] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, 605 (1993) article 703(3), Annex 703.3.; see NAFTA Implementation Act, 19 U.S.C. §§ 3301-3473 (1993).

[37] *Id.* at ch. 7(A).

B. BECAUSE THE NATURE OF THE MESSAGE FOR WHICH ASSESSMENTS ARE MADE IS PURELY COMMERCIAL, AND BECAUSE THE MARKETING PROGRAMS ARE AUTHORIZED TO ENGAGE IN ONLY A LIMITED SCOPE OF ACTIVITY, THERE IS LESS INTRUSION INTO FREE ASSOCIATIONAL INTERESTS THAN THERE IS WITH AN AGENCY SHOP ARRANGEMENT.

The second prong of the economic free association test is directed to minimizing the extent of intrusion upon free associational interests. The marketing programs here under review are *less* intrusive than the agency shops which this Court has long countenanced. This is for two reasons. Unlike the agency shop, the authorized collective representation under a marketing program is purely commercial. Moreover, the scope of activities which a marketing program can conduct is strictly limited by the scope of government authorization.

In a union shop arrangement, the union as the collective bargaining agent perforce engages in representation on issues that have political and social values. As this Court recognized in *Abood*:

> An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits

> on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. . . . The examples could be multiplied.

431 U.S. at 222.

By contrast, the marketing programs are less likely to conflict with a grower's views on sensitive political and social issues. This was recognized by the first published opinion to grapple with the First Amendment implications of a federal commodity marketing program. In *U.S. v. Frame*, 885 F.2d 1119, 1136 (3d Cir. 1989), the court drew the following comparison:

> "In comparison with the broad constitutional incursions arising from agency and union shop agreements and countenanced in *Hanson*, *Street*, and *Abood*, the Beef Promotion Act's interference with first amendment rights appears slight. The Cattlemen's Board is authorized only to develop a campaign to promote the product that the defendant himself has chosen to market. Thus, the Cattlemen's Board is authorized only to engage in commercial speech on behalf of beef producers. Unlike the union, the Board will not engage in activities that necessarily implicate a broad range of ideological, moral, religious, economic, and political interests, such as negotiation of wage increases, medical benefits, and limitations on the right to strike."

Moreover, unlike a union, which is not a government agency and which therefore has wide latitude to engage in a variety of expressive actions to which a dissenter might object,[38] a marketing program, as a government agency, has only such power as it is given by statute.[39] In the union shop situation one can expect there to be constant challenges to whether a particular union activity is "chargeable" to dissenters as well as to the faithful, and procedures must be in place for prompt adjudication. *Teachers v. Hudson*, 475 U.S. 292 (1986).

A marketing program, by contrast, is not rife with possibility for disputes over what can or cannot be charged to an objecting producer. Because of the limited charter of a government-created marketing program, there is not likely to be any margin at all between what is chargeable to the objecting producer and what is *ultra vires*. For example, when the California commission formed to promote table grapes sought to file an unfair labor practice with California's Agricultural Labor Relations Board, the court denied it the right to do so based upon its limited authorization. *United Farm Workers of America v. Agricultural Labor Relations Bd.*, 41 Cal.App.4th 303, 319 (1995). The court, relying on the rule that as a state agency the Table Grape Commission has only such powers as the law has affirmatively conferred on it, read the Commission's authorizing statute strictly. Using a strict reading, it ruled that the Commission's express

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[38] "We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." *Abood*, *supra*, at 335 (footnote omitted).

[39] See, *e.g.*, *Railway Labor Executives' Assn. v. National Mediation Bd.*, 29 F.3d 655, 666, n. 6 (D.C. Cir. 1994).

authorization to litigate must be interpreted to be limited solely to the purpose of collecting assessments. With such narrow limitations on the activities of a marketing program, there appears to be no room for the program to engage in activities which it is authorized to conduct, but which are not chargeable to an objecting producer.

C. THE COMMODITY MARKETING PROGRAMS POSE NO THREAT WHATSOEVER TO FREE SPEECH INTERESTS.

The third and final prong of the economic free association test requires that the scheme "not significantly add to the burdening of free speech inherent" in the function for which the collectivized representation is put in place. *Lehnert, supra*, 496 U.S. 507, 519. In regard to this third prong as well as to the second, the commodity marketing programs are more benign than the agency shop arrangements long countenanced by this Court. In fact, in this regard they are totally benign, because they impose no limitation whatsoever on free speech.

In the agency shop arrangement, the represented employee clearly suffers an abridgement of his ability to engage in free expression in that he is not allowed to represent himself in bargaining with his employer over the conditions of his employment.

By contrast, no restriction on speech attends the generic marketing program. Any producer covered by such a program is in no way constrained in conducting any advertising, promotion, or any other communication with any audience of its choosing. Indeed, the AMAA

expressly *precludes* any restrictions on the producer's right to advertise:

> No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

7 U.S.C. § 608c(10)

It should be noted here that the mere assessment of monies does not, as some have claimed and the court below suggested, constitute a constitutionally cognizable infringement on free speech. A passage in *Lathrop v. Donahoe*, 367 U.S. 820 (1961) explains why compelled contribution *cannot* be used to state a "free speech" claim:

> This argument . . . is that the mere exaction of dues money works a Constitutionally cognizable inhibition of speech by reducing the resources otherwise available to a dissident member for the espousal of causes in which he believes. The untenability of such a proposition becomes immediately apparent when it is recognized that this rationale would make every governmental exaction the material of a 'free speech' issue.

367 U.S. at 852 (concurring opinion by Justice Harlan).

Thus, there is no need to weigh whether the commodity marketing programs impinge on free speech interests substantially more than inherent to the function of generic commodity promotion, because they do not impinge on free speech at all.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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